IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.394 OF 2007

...

M/s.Jangid Builders Pvt.Ltd. ...Petitioner

v/s.

M/s.Evershine Education Trust

and ors. ...Respondents

...

Mr.Sanjay Jain i/b Mr.Vinod Thakar for the Petitioner.

Mr.A.A.Kumbhakoni i/b Ms.Gauri Godse for the Respondents Nos.1, 2, 4 to 6.

...

CORAM: D.K.DESHMUKH &

V.M.KANADE, JJ.

DATED: 17TH DECEMBER, 2007

P.C.:

1. By this petition, the Petitioner challenges the order dated 9th April, 2002 passed in Civil Appeal No.87 of 2002.

2. The facts that are relevant and material for deciding this petition are that the Petitioner has constructed a building. The Petitioner entered into an agreement to sell an area admeasuring 1002 sq.meter in that building to the Respondent, which is a public trust. Certain amounts were paid by the Respondent-trust. The Respondent-trust was also placed in possession of the area which was agreed to be sold to the Respondent-trust. Thereafter, the dispute arose between the parties. Therefore, the Petitioner filed a civil suit for a declaration that the agreement entered into between the parties stood terminated. The Respondent-trust also filed the suit claiming a decree of specific performance of the agreement. It was the contention of the Respondent that it is entitled to conveyance of 1002 sq.meters of area. It was claiming that it is in possession of

only 302.04 sq.meter of area. It was claiming that it has paid an amount of Rs.27 lakh to the Petitioner. Both these suits were tried together and were decided by a common judgment by the Civil Judge, Senior Division, Thane. The trial court dismissed the suit filed by the Petitioner. The trial court decreed the suit filed by the Respondent. It held that the Respondent is placed in possession of an area of 1002 sq.meter. It also held that the Respondent is entitled to the execution of the sale-deed of that area in its favour. It also held that an amount of Rs.54 lakh with interest at the rate of 21% p.a. is payable by the Respondent to the Petitioner as balance consideration.

3. Feeling aggrieved by the common judgment, the Petitioner has filed First appeal in this Court, being First appeal No.1771 of 2002 and which has been admitted for final hearing. The Respondent also filed an appeal against that judgment. That Appeal, however, was filed before the District Judge, Thane. In that appeal, an application was taken out for stay of the execution of the decree which is challenged before the Appeal court. By the order impugned, execution of that decree has been stayed. The

Petitioner, who is Respondent in the Appeal, has challenged that order in this petition. The Appeal which had been filed by the Respondent before the District Court has been transferred to this court and has been placed before us. The learned Counsel appearing for the Petitioner submitted that by the decree impugned in the appeal, the suit filed by the Respondent has been decreed. The Petitioner has been directed to execute the sale deed in favour of the Respondent on its paying the balance amount of consideration. There is also a finding recorded that the Respondent is in possession of an area admeasuring 1002 sq.meters. According to the learned Counsel, therefore, at least that part of the decree which requires the Respondent to deposit the amount of Rs.54 lakh with interest cannot be stayed, because the Respondent continues to occupy the area, which according to the finding recorded by the trial court is 1002 sq.meters. The learned Counsel submits that the Respondent is not depositing the money and continues to occupy the area without making payment of the full amount.

4. The learned Counsel appearing for the Respondent, on the other hand, submitted that an order was made

by the trial court after hearing both sides. The order is operating from 2002. The Respondent is a public trust and is running a school. It was also submitted that the petition is also guilty of latches, in as much as, the order has been passed in April, 2002, whereas the petition has been filed in the year 2007 in this Court.

5. In so far as aspect of latches is concerned, the learned Counsel for the Petitioner pointed out that there were proceedings taken up for transfer of the appeal of the Respondent which was pending before the District Court to this court, so that it could be heard with the connected appeal filed by the Petitioner. In those proceedings there was stay of further proceedings in the appeal. The Petitioner wanted to move the appellate court for review of the order, and therefore, the petition was not moved early. It was also pointed out that the same appeal has now been transferred to this court. In that appeal, civil application has been taken out for modification of the order.

6. The operative part of the order of the trial court in the civil suit reads as under:-

The Spl.C.S.No.233/97 is dismissed with no order as to costs.

Both the parties shall bear their own costs. The Reg.C.S.No.582/98 is hereby decreed. M/s.Evershine Education Trust shall pay balance consideration of Rs.54 lakhs to M/s.Jangid Builders Pvt.ltd. with interest @ 21% p.a. from the date of the suit, within the period of two months or deposit the same in the court.

On making such payment or depositing the same in the court, the Defendant M/s.Jangid Builders Pvt.Ltd. shall execute a deed of conveyance with respect to the suit premises as per the terms and conditions of the agreement dated 24-6-1996.

On failure to execute a deed of conveyance on the part of M/s.Jangid Builders Pvt.Ltd. the Plaintiff/M/s.Evershine Education trust, shall be entitled to get it executed through the Court.

On failure to make the payment of balance consideration price within above stipulated period by M/s.Evershine Education Trust, the Defendant/M/s.Jangid Builders Pvt.Ltd. shall be entitled to recover possession of the suit premises and M/s.Jangid Builders Pvt.Ltd. shall be entitled to make an application for inquiry to determine mesne profit regarding use and occupation of the suit premises by the M/s.Evershine Education Trust.

Both the parties shall bear their own costs.

Decree be drawn accordingly.

A copy of judgment be kept in R.C.S. No.582/98.

7. By its order the trial court has directed the Respondent to pay an amount of Rs.54 lakh with interest at the rate of 21% p.a. The trial court has, after appreciating the evidence on record, recorded a finding that an amount of Rs.54 lakh is in balance to be paid by the Respondent to the

Petitioner. The contention of the Respondent that it is in possession of an area of 302 sq.meters has been rejected and a clear finding has been recorded by the trial court that the Respondent is in possession of an area admeasuring 1002 sq.meters. The finding of the trial court reads as under:-

> "In my view the calculation, which has been given by the Jangid Builders in oral evidence as well as while submitting his arguments, is correctly calculated which comes to 1002 sq.meters. Therefore, I do not find any substance in the contention that the Evershine Trust is only in possession of the area of 302 sq.meters of the suit premises. As a matter of fact, the area of 1002 sq.meters was already incorporated in clause 2 of the agreement. Therefore the evidence adduced by Mr.Chandubhai Majithia will have to be believed and relied upon so far as the calculation of the area of the suit premises being 1002 sq.meters is concerned."

8. It is an admitted position that the Respondent is in possession of the entire area and is enjoying the

same. It is also common ground that the Respondent is not paying anything to the Petitioner for enjoying the area. In the Appeal that is filed by the Respondent, the only area of dispute is what is the amount payable by the Respondent to the Petitioner and what is the area in possession of the Respondent. On both these aspects there are findings recorded by the trial court. Therefore, for the purpose of making interim order, the appeal court will have to go by those findings. In our opinion, therefore, as the nature of the decree that is passed against the Respondent is a money decree for payment of the amount of Rs.54 lakh. We do not find any justification for staying that part of the decree, because if the amount is deposited by the Respondent and if the court ultimately finds that so much amount is not due and payable by the Respondent to the Petitioner, the amount can be refunded to the Respondent.

9. In these circumstances, therefore, in our opinion, the order passed by the appellate court which is impugned in the petition cannot be stayed. In our opinion, therefore, following order would meet the ends of justice.

O R D E R

(i) The order impugned in the petition is set aside.

(ii) The judgment and decree impugned in Civil Appeal No.87 of 2002, which has been transferred to this court for hearing shall remain stayed during the pendency of the appeal, subject to the condition that within a period of eight weeks from today the Respondent No.1 deposits in this court an amount of Rs.54 lakh.

(iii) The amount on being deposited shall be invested in fixed deposit in a nationalised bank.

(iii) Failure of the Respondent No.1 to deposit the amount shall result in vacation of the interim order of stay of execution of the decree.

(iv) Petition disposed of.

(D.K.DESHMUKH, J.)

(V.M.KANADE, J.)